Re James Kuok Khoon Huai; ex p Lim & Tan Securities Pte Ltd

HIGH COURT (SHAH ALAM) — BANKRUPTCY NO 29–3760 OF 1996
LOW HOP BING J
15 JUNE 2001

Bankruptcy *— Setting aside — Application to set aside creditor's petition and notice of bankruptcy — Change of domicile, whether proved — Burden of proof on judgment debtor — Proof of fact and intention to acquire domicile of choice — Whether application should be allowed on the ground that judgment debtor not domiciled in Federation or any state — Bankruptcy Act 1967 s 5(1)(d)*

The judgment debtor applied to set aside the judgment creditor's bankruptcy notice and creditor's petition on the ground that he was not domiciled in the Federation or in any State, relying on s 5(1)(d) of the Bankruptcy Act 1967. In his first affidavit, the judgment debtor affirmed that he was ordinarily resident in the Republic of Kampuchea and had been domiciled in that Republic since June 1991, on the basis of his Kampuchean identity card. In his second affidavit, the judgment debtor reaffirmed that he was ordinarily resident in the Republic of Kampuchea and exhibited a police certificate. In this second affidavit, no reference was made by him to his domicile of choice in Kampuchea. In his third affidavit, the judgment debtor again confirmed that he was ordinarily resident in the Republic of Kampuchea, without any mention whatsoever of his domicile of choice in Kampuchea. His domicile of origin was Malaysia. The deputy registrar allowed the judgment debtor's application and held that at the presentation of the creditor's petition, the judgment debtor was domiciled in Kampuchea and that there was no evidence that the judgment debtor was residing in Malaysia. He further held that the judgment debtor's Kampuchean identity card showed that he had acquired his domicile of choice. The judgment creditor appealed.

Held, allowing the appeal:

(1) The burden of proving that at the relevant time the judgment debtor was not domiciled in the Federation or in a State, in the terms of s 5(1)(d) limb (i) is on the judgment debtor. In order to succeed in establishing a domicile of choice, there must be both the fact and the intention of acquiring a domicile of choice. The two essential elements are residence and the requisite intention to reside permanently for an indeterminate period in the host country. A close examination of the facts as affirmed in the judgment debtor's affidavits demonstrated that the judgment debtor had not discharged the burden of proof. The judgment debtor's Kampuchean identity card expressly stated, inter alia, 'Nationality: Malaysia'. Further no affidavit was filed by the Kampuchean authorities to assist the court in arriving at an

inference of fact that the judgment debtor had been resident in the host country, ie Kampuchea for an indeterminate duration or permanence of stay with the requisite intention to give up his domicile of origin (see pp 326I–327A, 328A–C, E–F).

(2) The judgment debtor had failed to affirm an affidavit stating that he has surrendered his Malaysian passport and/or identity card to the Malaysian authorities. Instead, the judgment debtor had expressly stated in an affidavit affirmed by him in a bankruptcy proceedings against him in Singapore that his home is Malaysia which has always been his domicile and that he is a Malaysian citizen. In the circumstances, the court held that the judgment debtor had failed to establish that at the relevant time he had a final and deliberate intention to abandon his domicile of origin in Malaysia and to acquire a new domicile of choice in Kampuchea (see pp 329F–330A).

[**Bahasa Malaysia summary**

Penghutang penghakiman telah memohon untuk mengetepikan notis kebangkrapan pemiutang penghakiman dan petisyen pemiutang atas alasan bahawa beliau tidak berdomisil di Persekutuan atau mana-mana Negeri, berdasarkan s 5(1)(d) Akta Kebangkrapan 1967. Di dalam afidavit pertama beliau, penghutang penghakiman menegaskan bahawa beliau penetap biasa (ordinarily resident) di Republik Kampuchea dan telah berdomisil di Republik itu sejak Jun 1991, berdasarkan kad pengenalan Kanpuchea beliau. Di dalam afidavit kedua beliau, tiada rujukan dibuat oleh beliau tentang pilihan domisil beliau di Kampuchea. Di dalam afidavit kedua beliau tersebut, penghutang penghakiman sekali lagi mengesahkan bahawa beliau penetap biasa di Republik Kampuchea, tanpa menyebut apa-apapun tentang pilihan domisil beliau di Kampuchea. Domisil asal beliau adalah Malaysia. Timbalan pendaftar membenarkan permohonan penghutang penghakiman dan memutuskan bahawa dalam penyampaian petisyen pemiutang, pemiutang penghakiman berdomisil di Kampuchea dan bahawa tiada keterangan bahawa penghutang penghakiman menetap di Malaysia. Beliau seterusnya memutuskan bahawa kad pengenalan Kampuchea penghutang penghakiman menunjukkan bahawa beliau telah memperolehi domisil pilihan beliau. Pemiutang penghakiman membuat rayuan.

Diputuskan, membenarkan rayuan tersebut:

(1) Beban membuktikan bahawa pada masa berkaitan penghutang penghakiman tidak berdomisil di Persekutuan atau mana-mana Negeri, dalam terma s 5(1)(d) cabang (i) adalah terletak atas penghutang penghakiman. Untuk berjaya menunjukkan satu domisil pilihan, perlu ada kedua-dua fakta dan niat untuk mendapatkan satu domisil pilihan. Dua elemen penting adalah

penetapan dan niat yang diperlukan untuk mendapatkan penetapan tetap untuk satu tempoh yang tidak dapat ditentukan dalam negara tuan rumah tersebut. Pemeriksaan teliti fakta-fakta sebagaimana ditegaskan dalam afidavit-afidavit penghutang penghakiman menunjukkan bahawa penghutang penghakiman tidak bebas daripada beban bukti. Kad pengenalan Kampuchea penghutang jelas menyatakan, antara lain, 'Kerakyatan: Malaysia'. Tambahan pula tiada afidavit telah difailkan oleh pihak berkuasa Kampuchea untuk membantu mahkamah mencapai satu inferen fakta bahawa penghutang penghakiman telah menjadi penetap di negara tuan rumah, iaitu Kampuchea untuk satu tempoh yang tidak dapat ditentukan atau penetapan tetap dengan niat yang diperlukan untuk melepaskan domisil asal beliau (lihat ms 326I–327A, 328A–C, E–F).

(2) Penghutang penghakiman telah gagal untuk mengesahkan afidavit yang menyatakan bahawa beliau telah menyerahkan kad pengenalan dan/atau paspot Malaysia beliau kepada pihak berkuasa Malaysia. Sebaliknya, penghutang penghakiman telah dengan jelas menyatakan dalam afidavit yang disahkan oleh beliau dalam prosiding kebangkrapan terhadap beliau di Singapura bahawa beliau tinggal di Malaysia yang selama ini adalah domisil beliau dan bahawa beliau adalah rakyat Malaysia. Dalam keadaan ini, mahkamah memutuskan bahawa penghutang penghakiman telah gagal untuk menunjukkan bahawa pada masa berkaitan beliau mempunyai niat muktamad dan sengaja untuk meninggalkan domisil asal beliau di Malaysia dan mendapatkan satu domisil pilihan baru di Kampuchea (lihat ms 329F–330A).]

Notes

For a case on setting aside creditor's petition and notice of bankruptcy, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) para 2047.

Cases referred to

Bowie or Ramsay v Liverpool Royal Infirmary & Ors [1930] AC 588 (refd)

Eu Keng Chee, Decd, Re; Chan Pek Yuk & Anor v Commissioner of Estates Duties [1961] MLJ 210 (refd)

Johnson Roberts v Attorney General [1903] 1 Ch 821 (refd)

Peh Kong Wan, Re; ex p United Malayan Banking Corp Bhd [1992] 2 MLJ 292 (refd)

R Subramaniam a/l R Rengasamy, Re; ex p Public Finance Bhd Shah Alam High Court (Bankruptcy No 29–1007–1997) 27 February 2000 (refd)

Rayner v Rayner [1956] MLJ 179 (refd)

Legislation referred to

Bankruptcy Act 1967 s 5(1)(d)(i)

Kamil Azman bin Abdul Razak (*Amri Mohd Sham* with him) (*Skrine & Co*) for the judgment creditor/appellant.

HM Ooi (*Logan Sabapathy & Co*) for the judgment debtor/respondent.

Low Hop Bing J:

Appeal

This is an appeal in encl (25) by the petitioning ceditor against the decision of the learned deputy registrar who had on 14 October 1999 allowed the judgment debtor's summons in chambers in encl (20) and thereby setting aside the judgment creditor's bankruptcy notice dated 18 December 1996 in encl (3) and the creditor's petition dated 20 January 1998 in encl (10).

Ground of application

The sole ground of application contained in para (i) of the judgment debtor's summons in chambers in encl (20) is that the judgment debtor was not, at all material times, domiciled in the Federation or in any State. Although the words 'or within one year before the date of the presentation of the creditor's petition' had been added towards the end of para (i), with the utmost respect to the learned counsel who drafted this summons in chambers, they do not in any way convey any significance at all.

Affidavits in support

In encl (19) ie the judgment debtor's affidavit affirmed on 11 November 1998 in England in support of encl (20), the judgment debtor affirmed that he was ordinarily resident in the Republic of Kampuchea and had been domiciled in that Republic since 1 June 1991, on the basis of his Kampuchean Identity Card No 372996 and the translation thereof marked as exhs KKH1 and 2 respectively. The judgment debtor further stated that the petitioning ceditor is not entitled to present a bankruptcy petition against him and that the commencement of such proceedings herein against him amounted to a clear abuse of process.

In the judgment debtor's second affidavit in encl (22), which was affirmed on 28 May 1999 in Canada, the judgment debtor reaffirmed that he was ordinarily resident in the Republic of Kampuchea and exh as KKH3 a police certificate and the translation thereof. He reiterated that he had become ordinarily resident in Kampuchea. In this second affidavit, no reference was made by him to his domicile of choice in Kampuchea.

The judgment debtor's third and final affidavit in encl (24) was affirmed on 20 July 1999 in England and he again confirmed that he was ordinarily resident in the Republic of Kampuchea, without any mention whatsoever of his domicile of choice in Kampuchea. His domicile of origin is Malaysia.

Submission for petitioning ceditor

The petitioning ceditor relied on only one ground of appeal, ie that the learned deputy registrar had not given sufficient weight to the fact that the burden of proof lies on the judgment debtor to establish that the judgment debtor has attained a new domicile of choice and has abandoned his domicile of origin.

In substantiating this ground of appeal, En Kamil Azman bin Abdul Razak and En Amri Mohd Sham, both learned counsel for the petitioning ceditor, submitted that the judgment debtor has on the basis of his affidavits failed to establish that he has abandoned his domicile of origin in Malaysia and has thereby acquired his domicile of choice in Kampuchea.

It was contended for the petitioning ceditor that the judgment debtor's Kampuchean identity card bearing registration No 372996 does not conclusively discharge the burden of proof cast on the judgment creditor.

It was further argued for the petitioning ceditor that the judgment debtor has made conflicting allegations of facts in his own affidavits and therefore has shown a lack of credibility.

Submission for the judgment debtor

It was argued by En HM Ooi, learned counsel for the judgment debtor, that the judgment debtor's application to set aside the bankruptcy notice and the creditor's petition was on the grounds of both residence and domicile. The judgment debtor relied on s 5(1)(d) of the Bankruptcy Act 1967 ('the Act') and contended that the petitioning ceditor must satisfy the various limbs in s 5(1)(d) of the Act. Learned counsel for the judgment debtor did concede that so long as the petitioning ceditor can prove any one of the elements bringing the judgment debtor within the jurisdiction of Malaysia as required under s 5(1)(d) of the Act, the petitioning ceditor would be entitled to present a petition. Be that as it may, it is their view that once the petitioning ceditor elects to rely on any one of the elements under s 5(1)(d) of the Act, the burden of proving that the judgment debtor falls under s 5(1)(d) of the Act is placed on the petitioning ceditor and that the petitioning ceditor can adduce such prima facie evidence which can shift the burden to the judgment debtor to disprove any contention that the judgment debtor does come within the ambit of s 5(1)(d) of the Act. It was canvassed for the judgment debtor that the burden placed on the petitioning ceditor is not to be taken lightly or considered to be easily discharged, and that this burden must be properly and effectively discharged, given that a person who is made a bankrupt would have his status in society changed and would face quasi-penal consequences.

It was raised for the judgment debtor that the judgment debtor's Malaysian identity card has nothing to do with the question of his ordinary residence within Malaysia.

Deputy registrar's decision

In allowing the judgment debtor's application in encl (20), the learned deputy registrar held that at the presentation of the creditor's petition, the

judgment debtor was domiciled in Kampuchea and that there was no evidence that the judgment debtor was residing in Malaysia. He further held that the judgment debtor's Kampuchean identity card shows that he has acquired his domicile of choice.

Decision of the court

Issue for determination

In my judgment, the tenor of the respective learned counsel's submission and the learned deputy registrar's decision gave raise to only one issue for determination by the court ie whether, on the facts of the case as contained in the judgment debtor's three affidavits in support, the judgment debtor has succeeded in establishing Kampuchea as his domicile of choice?

Domicile

On the issue of the judgment debtor's domicile of choice in Kampuchea, s 5(1)(d) of the Act is immediately called into question, and it provides as follows:

> Conditions on which creditor may petition
> (1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless —
> (d) the debtor is domiciled in Malaysia or in any State or within one year before the date of the presentation of the petition has ordinarily resided or had a dwelling house or place of business in Malaysia or has carried on business in Malaysia personally or by means of an agent or is or has been within the same period a member of a firm or partnership which has carried on business in Malaysia by means of a partner or partners or an agent or manager.

Under s 5(1)(d) of the Act, the petitioning ceditor is barred or disentitled from presenting a bankruptcy petition unless the judgment debtor:

(i) is domiciled in the Federation or in a State; or

(ii) within one year before the date of the presentation of the petition:
  (a) had ordinarily resided or had a dwelling house or place of business in the Federation; or
  (b) has carried on business in the Federation personally or by means of an agent: or
  (c) is or has been within the same period a member of a firm of partnership which has carried on business in the Federation by means of a partner or partners or an agent or manager.

For the purpose of my judgment, I need only consider s 5(1)(d) limb (i) of the Act above, ie pertaining to domicile only, as the other grounds such as residence, etc have not been canvassed by the judgment debtor in his summons in chambers in encl (20).

In my view, the burden of proving that at the relevant time the judgment debtor was not domicile d in the Federation or in a State, in the

terms of s 5(1)(d) limb (i) is on the judgment debtor. *Halsbury's Laws of England* (4h Ed) para 432 reads as follows:

> There is a presumption against change of domicile. The burden of proving any change rests therefore on the person alleging it. A change of domicile is serious matter, not to be lightly inferred, and it must be clearly and unequivocally proved. [See also *Algemene Bank Nederland NV v Loo Choon Yow* [1989] 2 MLJ 258]

In *Re Peh Kong Wan; ex p United Malayan Banking Corp Bhd* [1992] 2 MLJ 292 at p 295, the judgment of VC George J (as he then was) revealed that Peh had in 1976 left Malaysia and his family had accompanied him. In that year he sought and obtained permanent resident status in Singapore. Initially he worked in Singapore and Hong Kong. In 1988, he went to work in Jakarta. After he left Malaysia, he ceased to have a dwelling house here and did not carry on any business here. He did not have any property here and apart from his guarantee, the subject of the judgment, which in 1988 resulted in the receiving and adjudication orders being made against him, he had and has no liabilities here. The learned judge concluded that Peh had since 1976 abandoned all connection with Malaysia save retaining his Malaysian passport and has sought and obtained permanent resident status in Singapore. On these facts, the learned judge held that Peh has established both the animus to change his domicile from Malaysia to Singapore and the factum of having effected the change. His Lordship followed various English authorities which establish some of the fundamental principles governing the domicile of a person. The starting point is the judgment of Farwell, J in *Re Johnson Roberts v Attorney General* [1903] 1 Ch 821 at p 826 which is also reproduced as follows:

> It is a settled principle of English law that no one shall be without a domicil. Every one takes at birth the domicil of his father, if he be legitimate, of his mother if illegitimate, and he may in later life acquire a domicil of choice. But until he does so, or if he abandons his domicil of choice, his domicil of origin remains or revives. To quote Lord Watson [13 App Cas 439]: 'Lord Westbury in *Udny v Udny* — LR 1 HL Sc 458 — said, 'Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time.' ".

A change of domicile from the domicile of origin must be made amimo et facto: per Viscount Dunedin in *Bowie or Ramsay v Liverpool Royal Infirmary & Ors* [1930] AC 588 at p 594. Lord Thankerton at p 595 of the same case observed that long residence establishes the factum of acquiring a domicile of choice, but there remains the question of the animus. It seems clear on the authorities that mere length of residence by itself is insufficient evidence from which to infer the animus; but the quality of the residence may afford the necessary inference. For instance, the purchase of a house or estate coupled with long residence therein and non-rentention of any home in the domicile of origin, might be sufficient to prove the intention to acquire a new domicile.

In my considered view, the principle that may be culled from the above authorities is that in order to succeed in establishing a domicile of choice, there must be both the fact and the intention of acquiring a domicile of choice. Examples of these two elements may be provided by a person's acquisition in the host country of a permanent resident status, uprooting one's family in the country of origin, purchase of a dwelling house in the host country and non-retention of a dwelling house in the country of origin, and an intention of continuing to reside in the host country for an unlimited time. A mere length of residence by itself is sufficient to infer the animus or intention. Therefore, the two essential elements are, first, residence and, secondly, the requisite intention to reside permanently for an indeterminate period in the host country. (See also *Re R Subramaniam a/l R Rengasamy; ex p Public Finance Bhd* (Shah Alam High Court Bankruptcy No 29–1007–1997 dated 27 February 2000).

A close examination of the facts as affirmed in the judgment debtor's three affidavits in support demonstrates that the judgment debtor had not discharged the burden of proof cast on him. Out of the three affidavits, only the first affidavit stated in para 4 that he has been domiciled in the Republic of Kampuchea since 1 June 1991 on the basis of his Kampuchean identity card. The other two affidavits affirmed by the judgment debtor made no reference to his domicile of choice, but merely stated that he was ordinarily resident in Kampuchea. It is to be observed that the English translation (exh KKH2) of the judgment debtor's Kampuchean identity card dated 1 June 1991 expressly stated, inter alia, 'NATIONALITY: Malaysia'. The English translation of his 'Police Certificate' in exh KKH3 shows that it was issued on 17 August 1993, wherein his nationality was stated as KHMER. It is not apparent as to the purpose, legal effect or implications of these two documents viz his Kampuchean identity card and his police certificate. There is nothing in these two documents nor was there any affidavit filed by the Kampuchean authorities to assist the court in arriving at an inference of fact that the judgment debtor has been resident in the host country ie Kampuchea for an indeterminate duration or permanence of stay with the requisite intention to give up his domicile of origin.

It is pertinent to point out that on 27 February 1987, the petitioning ceditor had obtained judgment against the judgment debtor and had thereupon commenced bankruptcy proceedings against the judgment debtor in Singapore. The judgment debtor had in his affidavits, one of which was affirmed on 16 May 1990 and the other two affirmed on 2 August 1990 to the effect that he was domiciled in Malaysia.

The judgment debtor applied for a new Malaysian identity card in or about late 1990 and there is no evidence that he has ever given up his Malaysian identity card with a Malaysian address. He has not affirmed that he no longer holds a Malaysian identity card with a Malaysian address. From the three affidavits filed by the judgment debtor, it seems clear to me that he has traveled to England and Canada for the purposes of attestation by the respective notary public there. It would be interesting to know whether the judgment debtor was traveling to these countries on a Malaysian or a Kampuchean passport. It would be of immense benefit to

A the judgment debtor to produce his Kampuchean passport in order to establish that he has not only the factum of adopting Kampuchea as his domicile of choice, but also the animus or intention to do so. However, this was not to be the case before me, especially when his Kampuchean identity card still states that his nationality is Malaysian. In the circumstances, I hold that he has failed to establish his domicile of choice.

B 'The onus of proving domicile of choice is, in law, a heavy one': per Taylor J in *Rayner v Rayner* [1956] MLJ 179. A similar sentiment was expressed by Buttrose J in *Re Eu Keng Chee, Decd; Chan Pek Yuk & Anor v Commissioner of Estates Duties* [1961] MLJ 210 in the following words:

> C Where a change of domicile is alleged, it must be proved with perfect clearness that the deceased had at the time of his death, formed a 'fixed and settled purpose', 'a determination', 'a final and deliberate intention' to abandon his existing domicile. There is a presumption in favour of the continuance of an existing domicile and, therefore, the burden of proving a change of domicile lies on the plaintiffs (in this instance, it was the Plaintiffs who are alleging a change of domicile). This presumption may have a decisive effect for if the D evidence is so conflicting or indeterminate that it is impossible to ascertain with certainty what the resident's intention was, the court will decide in favour of the existing domicile. The intention to abandon a domicile of choice must be unequivocal though the evidence necessary to establish it is less strong than that required to establish the acquisition of such a domicile.

E Another outstanding feature in the judgment debtor's attempt to establish his domicile of choice in Kampuchea may be observed in the Singapore bankruptcy proceedings where in answer to the petitioner's contention that the debtor had given the court an 'illusionary' address, the debtor affirmed an affidavit on the 2 August 1990 stating categorically that he had since May 1990 lived at No 12, Jalan SS 2/29, Petaling Jaya, 47300 Selangor, West F Malaysia ('the Petaling Jaya address'). However, in the debtor's affidavit in reply, filed in these proceedings, he now states that he and his wife had never lived at the Petaling Jaya address. These conflicting versions do not speak well for the judgment debtor.

Further, it is my specific finding that the judgment debtor has failed to affirm an affidavit stating that he has surrended his Malaysian passport and/ G or identity card to the Malaysian authorities. Instead, the judgment debtor has expressly stated in an affidavit affirmed on 2 August 1990 in the bankruptcy proceedings against him in Singapore in these words:

> After the first Bankruptcy action was commenced against me, I decided to return to my home in Malaysia, which has always been my domicile … I am a H Malaysian citizen. My domicile is in Malaysia … .

In para 14 of the judgment debtor's affidavit affirmed on 25 May 1999, he affirmed that he chose to reside in Cambodia after the present bankruptcy proceedings were commenced against him.

In the circumstances, having regard to all the three affidavits filed by the I judgment debtor herein, I hold that the judgment debtor has failed to establish that at the relevant time he had a final and deliberate intention to abandon his domicile of origin in Malaysia and to acquire a new domicile of

choice in Kampuchea. I therefore allow the appeal by the petitioning ceditor with costs, set aside the order of the learned deputy registrar and order that the bankruptcy notice and creditor's petition be heard on its merits.

Since as alluded to above, the judgment debtor merely cited domicile as his sole ground in his summons in chambers, my decision herein is confined to this ground only and there is no necessity for me to make any decision pertaining to the issue of ordinary residence at this stage.

Appeal allowed.

Reported by Jafisah Jaafar